

The Elusive Reconciliation in the Former Yugoslavia: Role of the ICTY

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1. Justice v. Peace

The first significant clash between the peace and legal processes in reaction to the recent wars in the former Yugoslavia occurred in late July 1995, when the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia ('ICTY'), Richard J. Goldstone, issued the indictment against Radovan Karadžić and Ratko Mladić, the political and military leaders of the Bosnian Serbs.

The indictment caused dismay in diplomatic corridors and military headquarters. Both of the accused – Karadžić in particular – had been privileged participants in the peace process. Those whose primary interest was to achieve peace – at any cost, to avoid increased military involvement – saw the Prosecutor's action as 'putting the spanner in the wheels of the peace process', and were irritated by the Tribunal's "irresponsible pursuit of justice", which did not take into account the "political ramifications" of such acts. Goldstone, however, did not pay much attention to it: "I wasn't a politician, I had no political advisers. I didn't know what the politicians were doing and for them to expect me to guess what the political ramifications would be – would be ridiculous".¹

Three months later, the Dayton peace conference started. It is often said that the Bosnian Serbs were "bombed to the negotiating table" because after the second Markale market massacre on 28 August 1995, there were large-scale NATO air strikes. That might very well be the case. But the agreement would not have been possible had Karadžić and Mladić not been forced to leave the negotiating table by Goldstone's indictment.

There are at least two reasons for that. First, once the scale of the Srebrenica massacre came to light, the Bosniak side would never agree to sit down with the persons

responsible for the gravest crime in Europe after World War II. Second, with Karadžić and Mladić on the negotiating team, Slobodan Milošević would never have been able to make the territorial concessions to the Bosniak and Croatian sides, the concessions that made the agreement possible. Justice, therefore, was not an obstacle to peace, but a contributing factor.

Four years later, in late May 1999, Goldstone's successor Louise Arbour charged the rump-Yugoslav president Slobodan Milošević and four other Serb officials with crimes against humanity in Kosovo. At that point, NATO air strikes against Serbia were in the third month and the Western powers were desperate to obtain any concession from Milošević which would make it possible for them to stop the unpopular intervention without losing face. There were concerns that Milošević, after the indictment, would lose any interest in achieving a political solution and decide to play out the war to the bitter, bloody end. Louise Arbour had other worries on her mind:²

The question of the possibility of Milošević being put out of reach of the Tribunal was a huge concern for me. I have no information but I assumed that part of the exit strategy might have involved an amnesty [...]. I was worried about a deal that would make him more out of reach, would make it more difficult in reality to move forward. So I figured, certainly from that point of view, that the sooner we move the better.

However, two weeks after his indictment, on 10 June 1995, Milošević capitulated. Yet again, the pursuit of justice did not prolong the war. In fact, it may well have made it shorter, and it definitely cut short Milošević's grip on power. It took some time, but the ICTY founders finally realised the potential of a criminal justice intervention as a "weapon in the arsenal of peace", as Louise Arbour de-

¹ Richard J. Goldstone, Interview for the documentary film 'Against All Odds', available at <http://sense-agency.com/documentaries.42.html>.

² Louise Arbour, Interview for the documentary film 'Against All Odds', available at <http://sense-agency.com/documentaries.42.html>.

fined it.³

2. Reconciliation v. Accountability

Two decades since the end of wars in Croatia and Bosnia and Herzegovina, ‘Tribunal fatigue’ is all-pervasive, not only in the Balkans. Local political, intellectual and religious leaders complain that the ICTY, by digging into the region’s bloody past, is in fact preventing their countries from reaching the radiant future of European integration and hindering the process of reconciliation. Their arguments are hailed by some in the international community, who question whether the ICTY may have caused more harm than good and whether the war crimes trials may have kept the interethnic tensions going, or even incited them.

Would the Balkans be a better and happier place without the ICTY’s quest for justice and accountability? Would it have been better to sweep the crimes under the carpet and stick the skeletons into the closets, to simply ‘forgive and forget’ in the interest of peace and a better future?

The same questions were already answered at the end of World War II, when all the concomitant atrocities of a civil, interethnic and religious war in the Balkans were swept under the carpet, in the interest of a brighter future under the banner of ‘brotherhood and unity’. Things appeared to be progressing well until the economic crisis of the 1980s and the emergence of irresponsible political leaders and their servants in the intelligentsia and media – almost all of them communists converted to nationalism⁴ – who started digging the dirt out from under the carpet and taking the skeletons out of the closet, rekindling old fears and the thirst for vengeance in order to retain their grip on power.

It was very easy to manipulate the myths of victimhood and to invoke the scores to settle, since there had been no just reckoning after World War II, no established and adjudicated facts about what was done by whom to whom between 1941 and 1945 and who is responsible. No accountability, in the other words.

As Alex Boraine, former Vice-President of the South African Truth and Reconciliation Commission, said testifying in 2002 at the ICTY:⁵

I would have to say that if accountability was not present,

³ Louise Arbour, Farewell Interview to Mirko Klarin, Tribunal Update No. 141, September 1999, available at <https://iwpr.net/global-voices/louise-arbour-farewell-interview>.

⁴ See Julija Bogoeva, ‘From Lies to Crimes: The Milošević Switch from Communism to Nationalism as State Policy’, Torkel Opsahl Academic EPublisher, FICHL Policy Brief Series No. 19 (2014), Florence, 2014 (<https://www.legal-tools.org/doc/dd3c98/>).

⁵ ICTY, *Prosecutor v. Biljana Plavšić*, Transcript, p. 591, line 10, Case No. IT-00-40-I, available at <http://icty.org/x/cases/plavsic/trans/en/021217IT.htm>.

then the reconciliation would be a contradiction in terms. I think systems of criminal justice exist not simply to determine guilt or innocence, but also to contribute to a safe and peaceful society. And therefore, these systems are absolutely critical in the process of reconciliation. They are not at odds. They are not a contradiction.

In the early days, when ICTY staff still believed in the lofty mission of “restoration and maintenance of peace, and contribution to the settlement of wider issues of accountability and reconciliation”, there were efforts to include those accused of war crimes in the process. The ICTY’s President Gabrielle Kirk McDonald visited the UN Detention Unit several times in 1998 to talk with the detainees. Goran Jelisić (also known as Serbian Adolf) described the talks in October 1998:⁶

There was a discussion about the fact that this institution, the Tribunal, should establish a lasting peace in Bosnia and Herzegovina through us. We sat down together later and realized that we have found the lasting peace among ourselves, but how our folks back there will reconcile, that’s really what we are worried about.

It is not difficult to understand why it is easier to achieve reconciliation in detention than in the world outside of prison. First of all, the UN Detention Unit tenants all have the same problems, their social situation is the same, they face similar charges and the same adversaries: the prosecution, judges, legal proceedings. Second, they know what they have to reconcile for, they know what happened and what they did. Last but not least, in detention they are to an extent isolated from the pernicious influences that “our folks back there” face: hate speech, propaganda, polarisation and continued hostility.

It is of course impossible to put more than 20 million inhabitants of the former Yugoslavia in the kind of social situation that exists in the UN Detention Unit. What then can the Tribunal do to contribute to the reconciliation, not only among its detainees, but of the “folks back home” who have been such cause for concern for Jelisić and others?

3. The Tribunal’s Contribution to Reconciliation

The reconciliation process was launched on the wave of political and social change that swept the region in 2000, first in Croatia, after the late Croatian President Franjo Tuđman’s death, and then in Serbia after Milošević was toppled. It was a top-down process, with much encouragement – or pressure – from the international community which instituted the so-called “conditionality policy”. Political contacts were established at the highest and other levels, economic ties and cultural exchange were re-estab-

⁶ Goran Jelisić in the documentary film ‘Against All Odds’, available at <http://sense-agency.com/documentaries.42.html>.

lished, local judiciaries were brought up to scratch to be able to try war crimes cases (with the assistance of the ICTY and the international community). The *Republika Srpska* published a report on the Srebrenica genocide, the parliaments adopted declarations condemning the crimes in Srebrenica and elsewhere, while civil society organisations tried to maintain the momentum of the top-down process, deepen it and transfer it to the grassroots level, by establishing ties between the victims associations active in various communities or inaugurating initiatives such as REKOM (Regional Commission for the Establishment of Facts on War Crimes).

The Tribunal has contributed to this process, both by supporting the reforms and building the capacities of local judiciaries, and through its investigations and trials which have established the facts of the cases and apportioned blame. These are the necessary preconditions of reconciliation: we must know what happened and who is responsible for it.

However, the impact of the established facts will depend on whether they are accepted as such, to what extent, in the local communities. Their acceptance will depend on the degree of trust of the local communities in the entity establishing the facts: in this case, it is the Tribunal.

The perception of the ICTY in the Balkans over the past two decades has been formed to a much greater extent by the positions and interests of the local political and intellectual elites, than by what the judges and prosecutors in The Hague have done or have failed to do. The public in the Balkans is very poorly informed about what the ICTY is doing. The little information they get is mostly superficial and wrong. Large segments of the public in Serbia and Croatia believe that the persons accused of war crimes would have a fairer trial in domestic courts than in the ICTY, while their judiciaries come last whenever people are polled about their trust in the institutions – trailing behind the church, the military, the police, the parliament and the government.

The problem is that the Tribunal's opinion of its 'constituency', as Judge Gabrielle Kirk McDonald called the public in the former Yugoslavia, is no better. A few years ago, at a promotion of a study by Diane Orentlicher on the ICTY's impact in the region, one of the panellists remarked that it did not matter what the victims and the public of the former Yugoslavia thought about the ICTY's judgments. He went on to note that it is much more important how the judgments will be seen by the international law experts and what their place will be in the history of international criminal law. This select company might well include the Western military-academic lobby, which has been very active in recent years in challenging some 'thoughtless legal standards' set by the Tribunal which might restrict the free-

dom of operation of military commanders, politicians and intelligence services of powerful states involved in conflicts beyond their borders.

What, if anything, could the Tribunal have done to improve its public image, or at least to make it more difficult for the local elites to distort and manipulate its message? And is it indeed necessary and appropriate for an international criminal tribunal to be concerned about its image and ratings, and to promote its fairness, impartiality and independence? National courts as a rule do not do that, but international courts face different challenges and cannot operate as a simple replica of a superior national court. This is especially valid for the ICTY and its communication with the public in the former Yugoslavia.

First of all, the ICTY is the first international *ad hoc* criminal court of its kind in history. There are no comparable precedents which might help us understand the nature of the court and what purpose or whom it has served.

Second, the ICTY is supposed to address the public in countries that have no experience of an independent judiciary. The public was weaned on the Marxist maxim that law was "an instrument in the hands of the ruling class"; it was only natural that it sees the ICTY as an instrument designed to bolster the interests of 'a new world order' in the Balkans.

Furthermore, the ICTY is addressing a public which has been traumatised by the experience of large-scale criminal conduct and has been brainwashed by nationalist propaganda of hatred, fear, revenge and other negative emotions.

Last but not least, the ICTY mandate is not limited to the prosecution and punishment of wrongdoers; it also includes contribution to a lasting peace, democracy, protection of human rights and inter-ethnic reconciliation in the Balkans.

We have thus gone back full circle, to reconciliation. In order to contribute to reconciliation, the facts established by the ICTY in the course of its trials must be accepted and internalised as the truth by the local communities. This requires the local communities to a) trust the fairness and impartiality of the ICTY, and b) understand its judgments.

We have already seen that the ICTY has not yet earned the trust of the local communities in the former Yugoslavia. As for the actual understanding of the Tribunal's decisions and moves, the situation is even less favourable. Hidden behind the dogma that 'judgments speak for themselves', the judges are convinced there is no need – and indeed, no obligation on their part – to explain to the public in the countries of the former Yugoslavia what the judgments are all about. The more controversial a judgment is, the more adamant they seem to be that it does indeed

‘speak for itself’, and that there is no need to provide any additional explanation and interpretation: it is not their responsibility or role to expound on the content or conclusions of their judgments.

4. Elusive Reconciliation

It is small wonder then that the local communities are so selective when it comes to the facts established in the ICTY judgments, which we might term ‘judicial truth’. The adjudicated facts that do not fit with their idea of the truth are simply disregarded and challenged, or manipulated in order to prove that the ICTY is biased. Since all sides in the conflicts in the former Yugoslavia see themselves primarily as victims, it is very difficult for them to accept the unpleasant facts and to realise that they too committed atrocities. Reconciliation will remain elusive while societies are still in denial, and for as long as they all claim their community was most victimized and that they were only defending themselves when the others attacked them.

And yet, despite all the manipulations and challenges, despite the ICTY’s lack of concern over the impact of its judgments in the region, for a while it appeared, at least in the first ten years of the 21st century, that the truth established at the Tribunal’s judgments was slowly trickling down and settling into acceptance that there were victims and suffering on the other sides too, engendering empathy and an embryonic reconciliation process. Civil society played an important role here: in a hostile nationalist environment, they took it upon themselves to interpret the Tribunal’s decisions and findings, an unpopular task at best.

Unfortunately, this promising, important process has ground to a halt at the time of writing. Lack of progress in Bosnia and Herzegovina and internal regression in Serbia and Croatia – where the nationalist discourse of the war years was resurrected – have pushed the region further away from reconciliation. Powerful political and social forces pull in the opposite direction and there is continued polarization among different communities, while at the same time, paradoxically, the same forces accuse the ICTY of failing to achieve reconciliation of the ethnic communities in the former Yugoslavia.

Sadly, the Balkans still seem to lack genuinely responsible political, religious and intellectual leaders who would

be ready to face the demons of the past in ways that unite rather than divide. There is no strong political consensus about reconciliation, and I fail to see serious current projects in the transitional justice, social and educational spheres that could facilitate it.

If the 1990s in the Balkans were a decade of a bloody nationalist drunken binge, the situation could now be described as a hangover before everyone sobers up. The experience of post-World War II Germany (as described by Hans Magnus Enzensberger and others) shows that people do not come to their senses right after the excesses of war. There is first “denial and a political and moral blockade manifested by the refusal to understand what happened and what was done”. According to Enzensberger, this process takes quite a long time, “but at one point, there comes a time when people, especially young people, start asking questions [...]”.⁷ In Germany, this happened only in the late 1960s.

When it happens in the Balkans, the facts adjudicated and established by the ICTY may become a solid foundation on which the societies of the former Yugoslavia could then build the reconciliation process. If nothing else, those facts will make it harder for any future nationalist leader to twist the events in the 1990s, and responsibility for them, in order to use them to lead Balkan societies into yet another round of bloody vengeance.

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⁷ *Naša Borba*, Belgrade, Interview with Hans Magnus Enzensberger, January 1996.